

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID JONATHAN COWANS,

Defendant-Appellant.

UNPUBLISHED
February 10, 2004

No. 243643
Kalamazoo Circuit Court
LC No. 01-001537-FC

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

A jury convicted defendant of three counts of armed robbery, MCL 750.529, arising from an incident in which three masked men robbed three victims at a Dairy Mart. He appeals by right arguing that the trial court erred by failing to suppress evidence, and that his trial counsel was constitutionally deficient. We find no error on the part of the trial court and conclude defendant has not established his claim of ineffective assistance of counsel. We affirm.

Defendant first argues that the trial court committed error mandating reversal when it denied his motion to suppress evidence obtained during a search of his car because the prosecution failed to prove he voluntarily consented to the search. We disagree.

This Court reviews a trial court's factual determinations at a suppression hearing for clear error and gives deference to the trial court's resolution of conflicting evidence and witness credibility. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). A decision is clearly erroneous if, although there is evidence to support it, the Court is left with a definite and firm conviction that a mistake has been made. *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1992).

Both the Michigan and United States constitutions guarantee the right to be free from unreasonable searches and seizures. US Const, AM IV; Const 1963, art 1§ 11. As a general rule, a search without a warrant is unreasonable. *People v Goforth*, 222 Mich App 306, 309; 564 NW2d 526 (1997). But a person may always waive his rights and consent to a search of himself or his property. *Goforth*, supra at 309. To be valid, the trial court must find from the totality of the circumstances that consent was "unequivocal, specific, and freely and intelligently given." *People v Marsack*, 231 Mich App 364, 378; 586 NW2d 234 (1998). The prosecutor has the burden of proving that the consent was freely and voluntarily given. *Farrow*, supra at 208.

Here, there is no question that Officer Bryan Ergang asked defendant for consent to search his car. Defendant, Ergang, Andre Brashers and Ashley Wheeler all testified at the suppression hearing. Ergang testified that not only had he asked defendant if he could search defendant's car, and defendant consented, but also that he had asked defendant a second time if he could search the trunk of the car, and that defendant once again consented. Further, Ergang testified that defendant never revoked his consent. Defendant, on the other hand, testified that he did not consent to a police search of his car. Neither party presented other testimony regarding whether defendant consented to the police search of his car. In these circumstances, the trial court's determination, by necessity, turned entirely on the credibility of the two witnesses. Because this Court gives deference to a trial court's resolution of conflicting evidence and witness credibility, *Farrow, supra* at 209, we cannot find clear error in the trial court's factual findings. We are not left with a definite and firm conviction that the court erred in finding Ergang to be the more credible of the two witnesses, and therefore in finding that defendant had freely given his consent for a police search of his car. *Chambers, supra* at 118. Accordingly, the trial court correctly denied defendant's motion to suppress evidence.

Defendant next argues that he was denied the effective assistance of counsel by the introduction of evidence of other bad acts because the evidence was irrelevant, more prejudicial than probative, and because it was improper character evidence. Again, however, we disagree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In order to overcome this presumption, a defendant must meet a two-pronged test. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 309, 338; 521 NW2d 797 (1994). Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial, *Strickland, supra* at 687; *Pickens, supra*, so that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Furthermore, constitutional error warranting reversal does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Pickens, supra*, at 31 n 12; *Rodgers, supra* at 714.

Defendant's claim of ineffective assistance of counsel is without merit because he has failed to overcome the presumption that trial counsel's assistance was effective. First, defendant has failed to overcome the presumption that trial counsel's actions were sound trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 445. In the present case, defense counsel argued that defendant was a young, scared teenager who simply was overwhelmed by the circumstances and admitted to virtually anything the police suggested. Under the defense theory of the case, it was reasonable trial strategy to allow testimony regarding other crimes defendant confessed to during police interrogations. Indeed, the wilder and more outlandish defendant's admissions were, the more they strengthened defendant's argument that he was coerced, frightened and willing to agree to anything. Under the circumstances, defendant has

failed to show that trial counsel's alleged errors were not sound trial strategy. Accordingly, defendant has failed to overcome the presumption that trial counsel's assistance was effective.

Moreover, defendant has failed to show that trial counsel could have successfully challenged the admission of the other acts evidence. MRE 402 provides that all relevant evidence is admissible, unless otherwise barred by the Michigan or United States Constitutions or by the Michigan Rules of Evidence or other Michigan court rules. MRE 401 defines relevant evidence as being that evidence having any tendency to make the existence of any fact that is of consequence to the determination more or less probable than it would be without the evidence. Although evidence of a person's character is not admissible to show action in conformity, under MRE 404(b)(1) "[e]vidence of other crimes, wrongs, or acts . . . may . . . be admissible for other purposes, such as . . . scheme, plan, or system in doing an act, knowledge, [or] identity . . . whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

Here, the prosecution was required to prove that defendant committed or participated in the crime. *People v Clark*, 113 Mich App 477, 480; 317 NW2d 664 (1982). Defendant was charged for participating in armed robberies committed by three men wearing Halloween masks, including a skeleton mask and a red devil mask, and carrying guns, one of which was a bb gun with a laser sight on it. Defendant claims counsel erred by not challenging below his admissions to uncharged crimes that all bore a significant resemblance to the charged crimes. According to defendant's statements to the police, during both armed robberies at the Burger King restaurant in Kalamazoo, defendant carried a bb gun with a laser sight, and during the second armed robbery of the restaurant defendant wore a skull mask. Similarly, defendant confessed to the armed robbery committed at the Shell gas station in Battle Creek and again carrying a bb gun with a laser sight and that both codefendants carried the same weapons as those carried in the Dairy Mart robbery for which defendant was charged. Under these circumstances, the challenged other acts evidence was relevant because it tended to make the existence of a fact that was of consequence, namely that defendant committed the armed robberies with which he was charged, more or less probable than it would be without this evidence. Moreover, this evidence also was admissible under MRE 404(b) for the proper purpose of showing both identity and that a common scheme, plan, or system existed. Further, while defendant has argued that the probative value of the evidence was exceeded by the danger of unfair prejudice, MRE 403, defendant has failed to explain why this is so, instead merely announcing that this is the case. Accordingly, defendant has failed to establish that the challenged evidence was inadmissible. Because counsel is not required to advocate a futile position, *Rodgers, supra* at 715, defendant has failed to show that defense counsel's performance fell below an objective standard of reasonableness or that the alleged errors were outcome determinative, *Toma, supra* at 302-303.

Finally, even if this Court were to find that trial counsel's failure to move in limine to bar the other acts testimony or to object at trial to this testimony and refrain from himself introducing such evidence constituted actions falling below an objective standard of reasonableness, defendant still cannot overcome the presumption that counsel's assistance was effective. Defendant must show that the alleged deficiencies were so prejudicial that he was deprived of a fair trial, *Strickland, supra*, at 687-688, and that there is a reasonable probability that but for counsel's unprofessional errors, the trial outcome would have been different, *Toma, supra*, at 302-303.

In the present case, the prosecutor presented overwhelming evidence of defendant's guilt. All three victims of the Dairy Mart robbery identified two of the four guns and two of the three masks found in defendant's car as those used during the robbery. In addition, the shoes defendant wore on the evening he was arrested were also identified by one of the Dairy Mart victims as being those worn by one of the three men who robbed the store. Moreover, Clories Love, one of three men arrested with defendant, testified that the masks and guns taken from defendant's car were those used in the Dairy Mart robbery, and that defendant participated in that robbery, carrying the bb gun with the laser scope and wearing the skull mask. In addition, Love's testimony matched the three victim's descriptions of events almost exactly and defendant's written statement regarding the robbery. And, Love's testimony about what happened after the robbery also directly matched what defendant described in his written statement. Further, defendant's oral confession to Ergang matched almost exactly the details of the robbery as described by the three victims and Love. In light of this overwhelming evidence that defendant committed the charged crimes, we find it is not reasonably probable that but for the alleged errors by counsel regarding the other acts evidence the trial outcome would have been different. Thus, defendant has failed to establish his claim of ineffective assistance of counsel.

We affirm.

/s/ Christopher M. Murray

/s/ William B. Murphy

/s/ Jane E. Markey